

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

TRIUMFO, INC.
(Respondent)s.

Case 28-CA-222740

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 631, affiliated with the
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

**TRIUMFO, INC.'S
POST-HEARING BRIEF**

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COMES NOW, TRIUMFO, INC., and hereby submits its trial brief as follows.

Dated this 4th day of April, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

On October 9, 2018, the National Labor Relations Board (“NRLB”) brought a complaint against Respondent Triumfo, Inc. (“Triumfo”) for unfair labor practice. Triumfo denied the allegations of the complaint on November 8, 2018.

The evidentiary hearing for this matter commenced on February 6, 2018. Witness Emanuel Garcia testified that Triumfo currently has four (4) managers and one or two employees. [p. 50]. Specifically, Triumfo employs a marketing manager, an office manager, and management in sales and business development. Thus, four (4) of these individuals cannot be classified as covered by the Collective Bargaining Agreement (“CBA”). The CBA only applies to someone who would manage “three or more persons,” per section 7 of the CBA.

Triumfo is a business entity that is subject to seasonal peaks and lows. Thus, at times there is simply no work and consequently, no employees. [p. 52]. In any event, Mr. Garcia testified that during those times Triumfo required labor, the individuals it obtained were often unprepared and arrived without the tools necessary to work. Mr. Garcia also testified that it appeared to him that these workers were simply trying to get the most hours they could get without work performance. [p. 57].

Notably, Section 8 of the CBA provides Triumfo the right to decline to use labor from the labor pool if the labor is not qualified.

Mr. Garcia testified that Triumfo hires labor to set up trade shows in Las Vegas, Chicago, and Atlanta. [p. 61]. However, Mr. Garcia also stated that Triumfo obtains union laborers from other third party employment agencies. [p. 59].

In any event, Mr. Garcia was unable to provide testimony regarding the invoices and did not have any personal knowledge about how the warehouse employees were hired. [p. 62, 63]. Mr. Garcia testified that there were only two or three employees working in the warehouse. [p. 62]. Mr. Garcia also advised that Triumfo has many trade shows outside Nevada. [p. 70] Thus, the bulk of the employees, save for possibly two or three people, were/are not covered by the CBA.

With respect to the managerial positions, Mr. Garcia testified that Roberto Lopez sets his own schedule, and if he needs time off he simply takes it. [p. 67]. Mr. Garcia also informed this Court that manager, Allen Alexander travels frequently or otherwise works at home from his laptop. [p. 67]. Similarly, manager Melvin Fiske takes time off of work when he desires and had all but one trade show outside Nevada. [p.69]. The only person who could possibly be considered a lead supervisor would be Robert Lopez, and he would only be considered a part of the CBA if there was actually three or more employees performing labor – which there were not.

Jesse Foreman testified that he is a Teamster Union laborer that was hired from a source other than the Labor Hiring Hall. [p. 75]. Mr. Foreman confirmed that Triumfo does trade shows in Los Angeles, San Diego, and Chicago and that he has performed work for Triumfo outside the jurisdiction of the CBA. [p. 77]. He stated that at the warehouse the materials for the booths are sent (rather than being manufactured at the warehouse). [p. 78]. Mr. Foreman did acknowledge that when HE was there, the booths did not come in pre-assembled from Poland or from China. [p. 79]. Mr. Foreman left Triumfo in early January 2018. [p. 75]. Mr. Foreman admitted he went out of hiring protocol, even though he was a member of the union. [p. 93]. His excuse was that he was helping a “dear friend.” [p. 98]. Mr. Foreman also corroborates the issue with quality workers, stating that they needed someone of quality that was knowledgeable. [p. 78].

Danny Jackson then testified. He works with Teamsters, and took a picture with ONE worker

working with a chainsaw. [p. 104]. He also testified that there was one guy working in the warehouse. [p. 110]. The other guys were simply standing over plans. [p. 110]. This testimony did not establish that someone was a lead supervisor over three or more persons. [p. 107]. In fact, there are not “three or more persons” to supervise, pursuant to CBA Sec. 7. During the ten minutes Mr. Jackson was at the warehouse, cutting parts for extruded aluminum was the only work he saw being performed. [p. 110].

After the Board rested, Respondent attempted to take a video deposition of Manish Kumar, the president, since he had problems getting here from India. [p. 18]. The Board objected and the Court denied Respondent’s request. Because Respondent attempted to make Mr. Gupta available it would be unfairly prejudicial for any adverse inference to be drawn, or to even argue or otherwise comment, that Mr. Kumar’s unavailability could be construed against him.

Kimberly Orvida then testified. Ms. Orvida stated she works at the warehouse building booths for the convention shows. [p. 152]. Ms. Orvida testified she was laid off for the summer and then brought back. [p. 166].

Robert Lopez, Melvin Fiske, and John Mantie are on salary. As was developed earlier, the roles of these individuals are not covered by the CBA, as they do marketing, sales, make phone calls, and have their own hours. Ms. Orvida’s testimony demonstrates that the business is seasonal, and further corroborates there are only a few workers at one time. Ms. Orvida could not state that she was fired, and Allen had a right to express his unhappiness about her taking pictures. Further, that was her subjective feeling, as Allan only mentioned that she was taking pictures. [p. 169].

Allen D. Alexander next testified. He is a show site manager, and travels much of the time. [p. 187]. He testified that the booths come from China and are pre-fabricated, thus reducing the amount of work that needed to be done by employees who may be covered under the CBA. [p. 187] This is presented to demonstrate that the payroll figures submitted to the Court are inflated insofar as being payroll from persons who arguably may be warehouse employees.

Mr. Alexander provided testimony regarding the photos that were taken in Triumpho’s warehouse. Mr. Alexander testified that the work performed in one of the photos was work on a booth that was returned. [p. 189]. Mr. Alexander went on to testify that he has never seen people cut

pieces. [p. 190]. Mr. Alexander reiterated that the counters in the photos were already prefabricated and up on the shelves [p. 190] and that Triumfo put Velcro on the booths, and outsourced the graphics. [p. 191]. Mr. Alexander emphasized that nothing is fabricated at the warehouse. [p. 194]. His testimony on this topic, that nothing is fabricated at the warehouse, was extensive, and that Triumfo doesn't have the capability in their shop to prefabricate. [p. 191-200]. Triumfo doesn't have the experienced workers necessary to prefabricate. [p. 201].

This testimony corroborates earlier testimony that the labor pool did not have suitable workers. Additionally, Mr. Alexander disputed Kimberly's testimony that she had been fired, stating he just saw her in the morning at the warehouse, and Kimberly was "there right now." [p. 203]. This was admitted over objection, as it went to her credibility. Mr. Alexander further testified that he travels half the time. [p. 206].

On cross, Mr. Alexander explained the decision to call Kimberly was his own [p. 212]. Mr. Alexander also explained the other people at Triumfo were managers. [p. 212]. The complaint was amended to include giving the impression of surveillance, and interrogating employees about union activity. [p. 213]. The sole evidence is that he, on his own, talked to her about taking pictures. Nothing further was discussed, and she was back at work at the time he was testifying.

Finally, Mr. Garcia was re-called, and further established that the trade booths are pre-fabricated from China, [p. 218]. The drawings are from India, and they are sent to China to be fabricated. This is significant because it shows that there was less actual work done at the warehouse than if there was actual assembly of these booths.

ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A FINDING THAT RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY QUESTIONING KIMBERLY ORVIDAS ABOUT HER UNION ACTIVITY

In Frontier Tel. of Rochester, Inc., 344 NLRB 1270, 1275 (N.L.R.B. 2005), the judge found that IHD supervisor Mazi Bakari's statement to a tech, that Bakari was aware of a message that another tech had posted on the Yahoo! web page, violated Section 8(a)(1) by creating the impression

among the techs that their union activities were under surveillance. The Board disagreed and dismissed this allegation. In the instant case, there was one conversation, the subject matter was dropped, and Kimberly remained in their employ.

THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH DAMAGES

“Damages cannot be based solely upon possibilities and speculative testimony.... When circumstantial evidence is used to prove a fact, the circumstances must be proved, and not themselves be presumed.” Franchise Tax Bd. of Cal. v. Hyatt, 335 P.3d 125, 156 (Nev.2014) (citations and internal quotation marks omitted). “The party seeking damages has the burden of proving both the fact of damages and the amount thereof. The latter aspect of the burden need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages.” Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co., Inc., 105 Nev. 855, 784 P.2d 954, 955 (1989) (citations omitted). Contreras v. Am. Fam. Mut. Ins. Co., 135 F. Supp. 3d 1208, 1221 (D. Nev. 2015).

Article 4 of the CBA allows Triumfo to determine the size of its operation, which operations may be shut down, what methods of operation is specified, and the scheduling of operations. Mr. Garcia, Mr. Lopez and Mr. Fiske cannot be considered replacements for lead supervisors. These individuals have a variety of business-related managerial duties, not manufacturing duties.

The only work covered by the CBA is work performed at the Nevada warehouse and the convention center in Las Vegas as the CBA only encompasses the jurisdiction of Nevada. Out of eight trade shows last year, there was only one trade show in Nevada. In this case, there was testimony that Respondent engaged in business activities which occurred outside the state, and therefore would not be covered by the CBA. The GC should not be allowed to generalize the amount of damages it seeks. It is incumbent upon the CG to establish which individuals are covered by the CBA and which are NOT covered by the CBA. Managers are not employees as defined by the CBA.

NEITHER MR. GARCIA, MR. LOPEZ, NOR MR. FISKE, ARE SUPERVISORS AS DEFINED
IN THE CBA OF EMPLOYEES

There is insufficient evidence to suggest that either Mr. Garcia, Mr. Lopez, Mr. Lopez, or Mr. Fiske ever supervised a crew of “three or more workers” at the Las Vegas warehouse. CBA p7, sec c(1). These managers traveled extensively and performed executive functions. These individuals cannot be considered to be Leadmen, or the functional equivalent, as defined in the CBA.

IT IS AN UNDISPUTED FACT THAT WORKERS FROM THE UNION POOL WERE
UNSUITABLE

The company had a right to decline to use labor from the labor pool, per section sec 8 of the CBA, since the workers obtained from the Union Boards were not qualified. This testimony came in without objection, and in fact was solicited by the GC. The Charging Party never offered any evidence of any kind to rebut this. This testimony is uncontradicted, and must be considered an undisputed fact. It would be error to reject this unrebutted testimony. *See U.S. v. One Bell Jet Ranger II Helicopter* 943 F.2d 1121, 1126 (C.A.9 (Wash.),1991), holding that, in light of unrebutted testimony, the district court’s findings were clearly erroneous. The Union breached section 8, and the Respondent was permitted to obtain qualified and suitable employees, which the labor pool was unable to provide.

THERE CANNOT BE ANY ADVERSE INFERENCE REGARDING MR. KUMAR’S NOT
BEING PRESENT, SINCE HE WAS AVAILABLE BY VIDEO, AND THE CG SUCCESSFULLY
ARGUED AGAINST HIS BEING ABLE TO TESTIFY IN THIS FASHION

The Board did not establish which employees listed on the payroll records were in fact covered by the CBA. General counsel (GC) subpoenaed the president, Mr. Kumar, who could have delineated who worked at the Nevada warehouse. Rather than permit Mr. Kumar to testify by video conferencing, the GC elected to move to exclude him. This, of course, is their right, but Mr. Kumar could have provided the required specificity as to which employees may have been hired in violation of the CBA.

The Supreme Court has established that the government violates due process when its conduct “effectively dr[ives a] witness off the stand.” *Webb v. Texas*, 409 U.S. 95, 98, 93 S.Ct. 351,

34 L.Ed.2d 330 (1972) (per curiam) Soo Park v. Thompson, 851 F.3d 910, 919 (9th Cir. 2017), cert. denied sub nom. Thompson v. Park, 138 S. Ct. 642 (2018). This witness was even subpoenaed by the GC.

“Damages cannot be based solely upon possibilities and speculative testimony.... When circumstantial evidence is used to prove a fact, the circumstances must be proved, and not themselves be presumed.” Franchise Tax Bd. of Cal. v. Hyatt, 335 P.3d 125, 156 (Nev.2014) (citations and internal quotation marks omitted). “The party seeking damages has the burden of proving both the fact of damages and the amount thereof. The latter aspect of the burden need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages.” Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co., Inc., 105 Nev. 855, 784 P.2d 954, 955 (1989) (citations omitted). Contreras v. Am. Fam. Mut. Ins. Co., 135 F. Supp. 3d 1208, 1221 (D. Nev. 2015).

The evidence presented is insufficient to establish with reasonable specificity the alleged amounts of wages owing and the evidence is insufficient to establish which individuals on the payroll were covered under the CBA. Based upon the foregoing, Respondent respectfully requests that the charging party take nothing from the Respondent.

Dated this 4th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that a copy of this Post-Hearing Brief was electronically served this 4th day of April, 2019 to the parties, and as noted, below:

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